between the Jewish custom in Calcutta and that in Singapore. But apart from that, questions of foreign law, (and for reasons stated above I regard this as a question of foreign law) can only be decided by evidence adduced for the purpose in the particular case before the Court. As Scrutton, L.J. said in *Deutsche Bank* v. *Banque des Marchands de Moscou*, 107 Law Journal at p. 389: "I am disposed to accept the view taken by a two-Judge Court of Appeal in *McCormick* v. *Garnett* (5 De G.M. & G. p. 278) that the Court cannot take note in one case of foreign law which has been proved in another case as a fact, but that it should require the foreign law to be proved again in the case then before it." Still less can it take note of foreign law proved in a different jurisdiction.

The only evidence of Jewish law or custom is the affidavit of Ezra Meir above referred to and which was filed on the 28th April 1938 and a further affidavit filed on the 15th June 1938. No doubt the deponent is an expert, but he did not give his evidence *viva voce* and was not cross-examined. In the result the Court was left in doubt as to many matters which might have been elucidated. In particular evidence might have been called as to the difference, if any, between the laws and customs prevailing among the Jews in Bombay and Calcutta and those prevailing in Singapore. It is also to be remembered that in the ketouba before the Court some of the provisions, for instance, the settlement of $25,000 by the bride's father, were actually carried into effect, whereas in the ketoubas which were the subjects of the Indian decisions none of the provisions appears to have been carried out. I have also referred above to the question whether a ketouba is intended to be effective on divorce only and not on intestacy and to the evidence given in *Joshua* v. *Arakie*, I.L.R. 38 Calc. p. 713 on this point. The Court cannot be expected to decide such difficult questions of fact upon the very scanty evidence placed before it.

It is, however, clear that if the ketouba was intended to be effective it required stamping as a settlement, and in the absence of stamping, is inadmissible in evidence under the provisions of section 52 of the Stamp Ordinance, (Cap. 228). Proviso (a) to that section provides that the instrument may be admitted in evidence on payment of the proper duty and penalty payable under section 47.

I think, therefore, that Rebecca Meyer should be at liberty, if she is so advised, to have the ketouba stamped and apply within one month to have the summons reheard and be at liberty to produce further evidence in support of her claim, such evidence being *viva voce*.

If no such application is made the Court will declare that the administrators are not at liberty to pay to the said Rebecca Meyer the sum of $55,555. It follows that a corrective affidavit will have to be filed for the Commissioner of Stamps.

Order accordingly.

Solicitors for the Plaintiff—*Chan & Eber.*
Solicitors for the Defendants—
Drew & Napier.

Solicitors for Rebecca Meyer—
Rodyk & Davidson.

[ORIGINAL CIVIL JURISDICTION]

TERRELL, J.

July 8, 1938.

IN RE THE ESTATE DUTY ORDINANCE, S. 36. *IN RE* THE ESTATE OF WYNFREDA JENNIE DUNBAR HOGG DECEASED.

[SINGAPORE ORIGINATING PETITION No. 2 of 1938]

Estate Duty—Private limited Company—Valuation of Shares on death of shareholder.

In valuing shares in a private limited company subject to restrictions on transfer, for the purpose of paying estate duty thereon, where a winding up was not contemplated at the death or compellable by a purchaser or purchasers of the shares of the deceased, the value of the shares must not be estimated on the basis of a hypothetical winding up at the date of the death, but must be estimated to be the price which in the opinion of the Commissioner of Estate Duties the shares would fetch if sold in the open market at the time of the death of the deceased. This must be to a certain extent a fictitious basis of valuation as shares which are subject to a restriction on transfer cannot be sold in the open market. The Court however is permitted to make the assumption that any purchaser can be put on the register. Subject to that all the rights and liabilities incident to the shares must be taken in consideration.

Commissioners of Inland Revenue v. *Crossman and others*, (1937) A.C. 26 followed.

ORIGINATING PETITION.

K. K. O'Connor, for the Petitioner.

N. A. Worley, Solicitor-General, for the Commissioner of Estate Duties.

Cur. Ad. Vult.

TERRELL, J.—This Petition involves the question, what is the proper valuation for estate duty purposes to place on 833 A shares of $100 each in the Singapore & General Investment Company (hereinafter called "the Company.") The shares in question formed part of the estate of Wynfreda Jeannie Dunbar Hogg deceased who died on the 15th November 1936, and the value of the shares must be ascertained as on that date.

The Commissioner of Estate Duties gave a certificate valuing such shares at $959 each. The Petitioner, who is the executor of the deceased, is aggrieved by such certificate and applies to the High Court for the determination of the duty payable under the provisions of section 36 of the Estate Duty Ordinance (Cap. 227).

The Company was registered as a private company on the 19th November 1925 with a capital of $500,000 divided into 5,000 shares of $100 each. On the 27th July 1933 a special resolution was confirmed whereby it was resolved that certain undivided profits be capitalised and that the existing share capital of 5,000 shares of $100 each be henceforth called ordinary shares and that the capital be increased by the creation of 5,000 new shares of $100 each to be called 'A' shares. At that time the only shareholders in the Company were Lady Anderson, who held 4,995 shares, and two Directors who held one share each. On the same day that the special resolution was confirmed an agreement was executed providing for the distribution among the shareholders of $500,000 being part of the undivided profits of the Company, and that such sum be applied in payment in full for the 5,000 new 'A' shares which were to be allotted to the members of the Company and their nominees.

In pursuance of this arrangement the 'A' shares were allotted as follows:—

To Lady Anderson ..	1,668	'A' shares
„ Lady Anderson and John Scott Anderson jointly ..	1,666	„ „
„ Mrs. Hogg (a daughter of Lady Anderson)	833	„ „
„ John Scott Anderson (son of Lady Anderson)		
	5,000	

On the 9th September 1935 Lady Anderson's holding of 4,995 ordinary shares and 1,668 'A' shares in the Company were transferred to a Company called United Investments Malaya Limited. The latter company is also a private Company in which Lady Anderson holds a controlling interest.

On the 15th November 1936 the shares in the Company were held as follows:—

Ordinary Shares.

United Investments Malaya Ltd.	4,995 shares
Two Directors	2 „
	4,997 shares

'A' Shares.

John Scott Anderson ..	833 shares
Mrs. Hogg (the deceased) ..	833 „
United Investments Malaya Ltd.	1,668 „
J. S. Anderson and J. C. Rash (jointly)	1,666 „
	5,000

The assets of the Company according to the balance sheet as on December 31st 1936 consisted of the following:—

124,900 Ordinary shares of $10 each in Guthrie & Co. Ltd.	$1,498,500.00
125,000 6% Cumulative Preference shares of $10 each in Guthrie & Co. Ltd.	
Sundry investments at cost	983,098.34
Loan Account	126,004.59
Interest accrued	9,857.45
Cash at Bank	68,372.37
	$2,685,832.75

The net profit for the year was shown as $236,081.75 i.e. sufficient to pay a dividend of 23% on the whole share capital.

A revised valuation of the assets of the Company as on the 15th November 1936 was made by its auditors, Messrs. Derrick & Co., the Guthrie shares being there valued on the basis of profits earned over the previous seven years. I understand that although the Commissioner of Estate Duties does not accept this valuation as being necessarily correct, it is agreed that I should accept such valuation for the purposes of this application. The revised valuation showed the assets of the Company to be worth $5,580,675.68.

The balance sheet contains a statement that the Company was under a contingent liability to purchase further shares in Guthrie & Co Ltd. The arrangement was that if in certain events Messrs. Guthrie & Company determined their agreement with a person referred to as the Director, the Company should upon notice purchase at a fair value the shares in Guthrie & Co. Ltd. held by the Director or the Five Trust Limited. The shares so held were 25,000 Preference shares and 25,000 Ordinary shares. In Messrs. Derrick & Company's valuation the Preference shares were valued at $12 each and the Ordinary shares at $22.04 each. The prospective liability in respect of these shares was accordingly as on the 15th November 1936 $857,000, but such liability might be increased or reduced in future years according to the fortunes of Guthrie & Co. Ltd. and the profits which that Company earned.

It is now necessary to consider the rights of the 'A' shareholders under the Memorandum and Articles and the special resolutions which were confirmed on the 27th July 1933.

Attention should be called to the fact that Lady Anderson through the United Investments Malaya Ltd. had a majority of all the shares in the Company, i.e. the whole of the ordinary shares and one-third of the "A" shares. Under Article 4 the rights of the 'A' shareholders could be varied with the consent in writing of the holders of three-quarters of the issued 'A' shares. As Mrs. Hogg owned one-sixth only of such shares, she could not have opposed a variation of her rights if all the other 'A' shareholders consented. No such variation has, however, been suggested, and I have assumed that no variation is likely to be made, which will diminish the existing rights of the 'A' shareholders. If such rights were interfered with solely for the benefit of the majority shareholders a minority shareholder could no doubt protect his rights by an application to the Courts.

As the Company is a private Company there is the usual restriction on the right of transfer of the shares of the Company under Article 17. If a shareholder wishes to transfer he can transfer to a member of the Company. If he wishes to transfer to someone other than a member he must give notice to the Company. The Company can then within 42 days find a member or other suitable person who will take a transfer of the shares upon payment of the fair value. Under Article 17 (4) the fair value is that which the auditor certifies in his opinion to be the fair value.

Under Article 17 (6) if the Company fails to find a person willing to purchase the shares within 42 days, the shareholder may within 2 months sell and transfer the shares elsewhere, subject however to the right of the Directors to refuse the transfer when, in their opinion, it is not desirable to admit the proposed transferee to membership.

With reference to dividends, the following Articles are of importance:—

> 92. The Company in general meeting may declare dividends, but no dividend shall exceed the amount recommended by the directors.
>
> 96. The directors may, before recommending any dividend, set aside out of the profits of the Company such sums as they think proper as a reserve or reserves which shall, at the discretion of the directors, be applicable for meeting contingencies, or for equalizing dividends, or for any other purpose to which the profits of the Company may be properly applied, and pending such application may, at like discretion, either be employed in the business of the Company or be invested in such investments, other than shares of the Company, as the directors may from time to time think fit.
>
> 99A (1) Any general meeting declaring a dividend may resolve that such dividend be paid wholly or in part by the distribution of specific assets, and in particular or paid up shares, debentures, or debenture stock of the Company, or paid up shares, debentures, or debenture stock of any other company, or in any one or more of such ways.
>
> 99A (2) Any general meeting may resolve that any moneys, investments, or other assets forming part of the undivided profits of the Company standing to the credit of the reserve fund or in the hands of the Company and available for dividend or any accretion to capital arising on sale or shown by a valuation or re-valuation of any property or assets of the Company be capitalised and distributed amongst the shareholders on the footing that they become entitled thereto as capital and that all or any part of such capitalised fund be applied on behalf of the shareholders in paying up in full any unissued shares of the Company and that such unissued shares so fully paid be distributed amongst the shareholders and shall be accepted by them in full satisfaction of their interest in the capitalised sum. The Directors shall give effect to any resolution under this article and for that purpose may settle any difficulty which may arise in regard to the distribution as they think expedient, and in particular may issue fractional certificates, and may fix the value for distribution of any specific assets, and may determine that cash payments shall be made to any members upon the footing of the value so fixed or that fractions of less value than $100 may be disregarded in order to adjust the rights of all parties, and may vest any such cash or specific assets in trustees upon such trusts for the persons entitled to any dividend or the capitalised sum as may seem expedient to the Directors. Where requisite, a proper contract shall be filed in accordance with section 91 of the Ordinance and the Directors may appoint any person to sign such contract on behalf of

the persons entitled to the dividend or capitalised fund and such appointment shall be effective.

The special resolutions providing for the increase of the capital to $1,000,000 and the creation of the 'A' shares are as follows:—

> "2. That the 5,000 shares of $100 each in the capital of the Company numbered 1 to 5,000 be henceforth called "Ordinary Shares." And that on a winding up of the Company none of such Ordinary shares shall carry the right to participate in the surplus assets of the Company beyond the full amount paid up on each of such Ordinary shares, the holders of such of the said shares as have been issued having consented thereto pursuant to Article 4.
>
> 3. That the capital of the Company be increased to $1,000,000 by the creation of 5,000 new shares of $100 each to be called "A" shares and that the said shares shall carry (a) the right to participate in a distribution of profits up to but not exceeding a dividend of 15 per cent. in respect of any year, if declared, after paying or providing for the payment of a dividend for such year on the Ordinary shares at the rate of 15 per cent but shall not carry any further right to participate in profits except to such extent (if any) as the Company in General Meeting may from time to time resolve; and (b) the right in a winding up to the whole of the surplus assets of the Company available for distribution amongst its members which remain after repaying the whole of the capital paid up on the Ordinary shares."

The rights of the ordinary and 'A' shareholders *inter se* depend very largely on the construction of the articles and the 2nd and 3rd special resolutions. The contentions of the Petitioners may be summarised as follows:—

(1) Under the 3rd special resolution the Ordinaries are entitled to 15%, and if there are further funds which the Directors consider distributable, then the 'A's and the Ordinaries will rank *pari passu*. That is to say, supposing a further $75.000 (sufficient to pay the 'A's 15%) were available each class of shareholders would get 7½%, and accordingly the 'A's would not get their 15% unless the Ordinaries received 30%.

(2) That the 'A's are only entitled to surplus assets (beyond their annual dividend of 15% at the most), on a liquidation, that no liquidation has ever been in contemplation and that it must be presumed that the majority shareholders would oppose a liquidation which would be contrary to their interests.

(3) As a consequence the whole of the undivided profits, whether standing to the credit of the reserve fund or in the hands of the Company and available for dividend, belong to the Ordinary shareholders, and, subject to the payment of a total 15% in any one year to the 'A's, could be distributed among the Ordinary shareholders, either *in specie* under Article 99A (1), or by capitalising such assets and allotting to them fully paid shares.

(4) That the 'A's have at the discretion of the Directors never received more than 5%, and that the shares cannot be valued on any higher basis.

I do not think that all these contentions are sound.

As regards (1), the suggested construction of the third special resolution, it is admitted that the Company has never acted upon such a construction. Ever since the 'A' shares were established, the Ordinaries have received 15% and the 'A's 2½% for the first half year and 5% thereafter. The argument put forward is apparently based on giving a narrow and f[illegible]ced construction to the word 'participate.' In my opinion the word is used loosely and the meaning of the words "the right to participate in a distribution of profits up to but not exceeding 15% etc." is merely that the 'A' shares shall be entitled to a dividend of not exceeding 15% after the Ordinary shares have received 15%. It has frequently been laid down as a general proposition that in the absence of provision to the contrary the rights of shareholders are equal (see for instance, *per* Astbury J. in *In re Fraser and Chalmers Limited,* (1919) 2 Ch. p. 114 at p. 126). The third special resolution appears to mean that each class of shareholders is in the first instance to receive 15%, but that the Ordinary shareholders are to have a preference. If it was intended that the 'A' shareholders could only receive 15% if the Ordinary shareholders received 30%, such an intention should have been clearly expressed.

As regards (2), it cannot be disputed that no liquidation was or is in contemplation.

As regards (3), the Solicitor-General for the respondents drew a distinction between the rights of the shareholders under Article 99A (1) and 99A (2). The former article is merely machinery for the payment of dividends when declared. It must I think be conceded that the Company could at any moment distribute the whole of the surplus assets by way of dividend to the Ordinary shareholders, either in cash or *in specie*, subject to the payment of the full 15% in that particular

year to the 'A' shareholders. This must, however, be subject to two qualifications: first it is clear from the balance sheets that large sums have been placed to reserve annually, and it is stated that one of the objects in establishing a large reserve fund was to meet the contingent liability to purchase further shares in Guthrie & Co. Ltd. I doubt whether it would be permissible for the Directors to dissipate the whole of the reserve fund, and then make that an excuse for depriving the 'A' shareholders of their 15% dividend on the ground that the reserve fund to meet the contingent liability had to be re-establish. Secondly, there is nothing to prevent the Company from declaring a dividend in favour of the 'A' shareholders in excess of 15%.

As regards (4), this argument overlooks the fact that the 'A' shares *have a right to 15%*. This right could admittedly not be exercised if the profits were insufficient for paying it. But so far as actual profits are concerned, these have been large enough to pay 15% ever since the 'A' shares were issued in 1933 and both in 1935 and 1936 the profits were sufficient to pay 23% on the whole share capital. If it was necessary to set aside part of such profits to meet the contingent liability for the purchase of Guthrie's shares, such liability, which only amounts to about $857,000, has been amply provided for by the investments of the Company (other than shares in Guthrie & Co. Ltd), which amount to over $1,250,000. There are no other liabilities to provide for, as the Company is not a trading concern. Provided, therefore, that the profits of the Company are not less than 15 per cent. per annum—a considerable reduction on the amount recently earned—the 'A' shareholders have every right to expect a dividend of 15% on their shares.

Now in valuing the shares for estate duty purposes several suggested valuations have been put forward. The Petitioners would value them at par: i.e. on a 5% basis. The original valuation of the Commissioner of Estate Duties was as on a winding up. For reasons stated above I do not think a valuation on this basis can be supported.

The value of the shares under section 15 (1) of the Ordinance (corresponding to section 7 (5) of the English Act) shall be estimated to be the price which in the opinion of the Commissioner such property would fetch if sold in the open market at the time of the death of the deceased It is to a certain extent a fictitious basis of valuation, as shares which are subject to a restriction on transfer cannot be sold in the open market. As a result, however, of *Jameson's case*, 1905. 2 Ir. p. 218, and *Paulin's case* 1936, 1 L.T. p. 570, the Court is permitted to make the assumption that any purchaser could be put on the register. Subject to that all the rights and liabilities incident to the shares must be taken into consideration.

Of these rights, the right to a dividend of 15% is to my mind clearly the most important, but all the other elements must be taken into consideration (see *per* Lord Hailsham in *Paulin's case* at p. 576). Such elements are the subsequent restriction on alienation, the right to purchase the shares of other members at a fair value as fixed by the Company's auditor, the prospective right on a winding up, the amount of the assets which exceed the issued capital several times over, and the possibility of the 'A' shares receiving a dividend in excess of 15% if the Company in general meeting so resolves. There is also the possibility of the 'A' shareholders participating with the Ordinary shareholders on a further distribution of shares under Article 99A (2). As regards the latter point, it does not appear to me to be necessary to decide the actual construction of Article 99A (2), but at least the construction contended for by the Crown is a possible one, and therefore an element which a purchaser might well take into consideration.

The real basis, however, appears to me to be the prospect of the shares earning 15%. In *Paulin's* case if any shareholder wished to transfer his share there were special articles dealing with the price which he was entitled to receive. That price was worked out as at the date of death at £209-13-8 a share, and the Petitioners in that case contended that the principal value could not be more than this. The House of Lords, however, accepted Finlay J's valuation of £351-0-0 because of the other elements to be taken into consideration, including the right to receive dividends in the meantime. This valuation gave a return of 12½% on the shares, but it does not follow that because of the peculiar provisions of the articles in *Paulin's* case a similar return should be expected in the present case where these particular provisions do not occur. If the interest return were the only consideration, then, in view of the fact that most of the assets of the Company are invested in a trading concern, I should estimate the value on a 5% basis, but I think a purchaser would take into consideration the other actual and possible benefits likely to accrue to an 'A' shareholder in the Company, and I accordingly accept the lowest of Mr. Philip's valuations, and value the shares on a 4% basis at $375 per share.

Judgment accordingly.

Solicitors for the Petitioner—

Drew & Napier.